Supreme Court, U.S.
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No. 97-2035

In The

Supreme Court of the United States

October Term, 1997

CAROLYN PROPERTIES I, Florida general partnership; CAROLYN PROPERTIES, INC., a Florida corporation; JOIVECA CORPORATION, a Florida corporation; JLP HOLDINGS, INC., a Florida corporation; TK HOLDINGS, INC., a Florida corporation; HHC MIAMI, INC., a Florida corporation; and UNIVERSAL CONSULTANTS, LTD., CO., a Florida corporation,

Petitioners,

vs.

THE MITSUI TRUST & BANKING CO., LTD., a foreign corporation and KAJIMA INTERNATIONAL, INC., a foreign corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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FURTHER REASONS FOR GRANTING THE WRIT

Petitioners respectfully reply in support of their petition. Pursuant to Supreme Court Rule 15(b), Petitioners limit this reply to response to new points raised by the opposition briefs of respondent The Mitsui Trust & Banking Co., Ltd., ("Mitsui") and Kajima International, Inc. ("Kajima").

A. The Opinion Below Presents a Direct Conflict Between the Circuits on the Basic Elements of a BHCA Claim

Mitsui questions in a footnote whether a conflict is "actually" presented between the Eleventh Circuit's decision here and the Fifth Circuit's decision in *Dibidale of Louisiana v. American Bank Trust Co.*, 916 F.2d 300, 306 (5th Cir. 1990), *amended*, 941 F.2d 308 (5th Cir. 1991) (Mitsui brief at 11 n.3).

The Eleventh Circuit and the Fifth Circuit do directly conflict over whether the BHCA requires proof by a borrower of "force" or "coercion." The Eleventh Circuit requires a borrower to prove "force" or "coercion" to prevail under the BHCA; the Fifth Circuit does not. *See Integon Life Insur. Corp. v. Browning*, 989 F.2d 1143, 1151 n.20 (11th Cir. 1993) (followed by the Eleventh Circuit in its opinion here and noting its conflict with *Dibidale*).

This conflict is accentuated because the Fifth Circuit and the Eleventh Circuit have reached different conclusions on nearly identical fact patterns. As here, the borrower in *Dibidale* sued its lender because the bank required that the borrower use a specific general contractor to build a project (the bank's affiliate held that contractor's accounts receivable). In *Dibidale*, the loan commitment itself expressly recited that the borrower "was not coerced or forced" to select the general contractor. Further, the borrower admitted that it was "comfortable" with

the contractor and that it "did not protest" its selection. 916 F.2d at 303, 307. Yet the Fifth Circuit still concluded that genuine issues of material fact existed whether the bank violated the BHCA. Critical to this holding was the Fifth Circuit's legal conclusion that "force" or "coercion" are **not** elements of a BHCA claim.

The facts here are far more compelling. In *Dibidale*, the bank was only "strongly urging" the use of the contractor. 916 F.2d at 307. Here, Mitsui admitted that Kajima was a "requirement" of the loan.

Mitsui admits in its brief that the Eleventh Circuit concluded that Carolyn had to prove that "Mitsui had conditioned the loan on [Carolyn's] use of KII." (Mitsui brief at 17). That is precisely Carolyn's point. Mitsui's own officers admitted under oath that Mitsui *did* in fact require that Kajima serve as the contractor. Mitsui cannot escape its own officers' — and its own brief's — admissions. Mitsui essentially has confessed error.

B. The Opinion Below Squarely Held That Carolyn Had to Prove That Mitsui Used "Force" or "Coercion"

Mitsui argues that the Eleventh Circuit did not hold that "force" or "coercion" were required. Mitsui asserts that "[t]he question of whether coercion is required to establish tying under the BHCA is simply not presented by the Eleventh Circuit's opinion." (Mitsui brief at 13). Mitsui makes this argument throughout its brief. (*See* Mitsui's brief at 10, 12, 13, 15, and 17). Mitsui's argument is patently incorrect.

The Eleventh Circuit ***repeatedly*** did hold that, to prevail under its Bank Holding Company Act ("BHCA") claim, Carolyn was required to prove that Mitsui "forced" or "coerced" it to

use Kajima as the contractor. The Eleventh Circuit stated in its opinion:

> Therefore, in order to succeed on its BHCA claim, Carolyn must prove that Mitsui ***forced*** or ***coerced*** Carolyn into using KII as the general contractor as a condition to obtaining the loan.

App. at 9(a) (Emphasis added).

Mitsui therefore has no grounds whatever to assert that the opinion below omits the question whether the BHCA contains elements of "force" and "coercion." That is the stated foundation of the Eleventh Circuit's opinion. Were "force" or "coercion" not required under the BHCA, the Eleventh Circuit would have had to engage in an entirely different analysis — whether Kajima was a "condition" or "requirement" of the loan. But Mitsui has already admitted that the answer to that question is Yes. The determination of the proper elements of a BHCA claim becomes dispositive here.

C. The Issue Presented is Solely One of Law — The Relevant Facts Are Undisputed

Mitsui presents two alternative arguments. First, it argues that Carolyn's claim was properly dismissed as a matter of Florida state law and, second, that there is no need to re-examine the factual record.

Mitsui's first argument fails: state law, of course, can never "legalize" a violation of a federal statute. Further, Mitsui's argument ignores Supreme Court precedent holding that an antitrust violation need not be the sole cause of plaintiff's injuries, only a material cause. (*See* Petitioners' petition at 17).

With respect to Mitsui's other argument, there is no need to re-examine the factual record. The issue presented is whether the Eleventh Circuit correctly interpreted the BHCA by requiring Carolyn to prove "force" or "coercion" — elements not contained on the face of the statute. Mitsui's officers have admitted under oath that Kajima was a "requirement" under the loan commitment. Thus, the record is crystallized, and the only issue is a legal one.

D. Respondent Kajima's Summary Judgment Should Be Reviewed on Certiorari Because the BHCA Ruling Served as a Premise to Kajima's Dismissal

Kajima claims that no grounds for certiorari exist with respect to its summary judgment. But at least part of the Eleventh Circuit's decision below hinges on that court's erroneous finding that the bank committed no BHCA violation. The court stated that Kajima could not be held liable because Carolyn could not fulfill the terms of the loan. However, were this Court to conclude that Mitsui's BHCA violation even in part impeded Carolyn's ability to close, then the premise underlying the Kajima dismissal is flawed.

CONCLUSION

The virtually unchecked current expansion of banks into the securities field and many other endeavors, renders clarification of the BHCA's anti-tying provision more critical than ever before. The very fabric of American financial integrity has become imperiled. The Court should grant the petition for writ of certiorari to resolve the conflict between circuit courts on the basis elements of a BHCA claim.[1]

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1. Mitsui acknowledges that it "advanced below" the argument that it could not have used "force" and "coercion" because Carolyn initially proposed Kajima. (Mitsui brief at 12 n.4). Mitsui's argument fails as a matter of law. *See Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138, 142 S. Ct. 1981 (1968) *overruled in part on other grounds* by *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731 (1984) (even a party which "solemnly subscribed" to an agreement still has a valid antitrust claim as of the day the other party "forces it to comply unwillingly" with the tie); *Tidmore Oil Co. v. BP Oil Co.*, 932 F.2d 1384, 1388 (11th Cir. 1991) (under antitrust laws, "an agreement may be challenged even by one of the parties who has acquiesced in the unlawful agreement").

Respectfully submitted,

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